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No. 00-444

In the
Supreme Court of the United States
October Term, 2000

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, et al.,
Petitioners,

v.

DONALD K. STERN, in his Official Capacity as United States Attorney for the District of Massachusetts,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondent offers no persuasive reason why this Court should not grant review both of the First Circuit's construction of the Citizens Protection Act, 28 U.S.C. § 530B, and of the First Circuit's practice of counting a recused judge as a judge "in regular active

service" for purposes of determining whether to grant a petition for rehearing en banc under Fed. R. App. P. 35(a) and 28 U.S.C. § 46(c). As the Judges demonstrated in their Petition for Certiorari, guidance from this Court is necessary to clarify which rules "governing attorneys" the Act requires federal prosecutors to follow in the thousands of criminal investigations and prosecutions that take place each year. Without assistance from this Court, confusion over prosecutors' ethical obligations will continue to disrupt the administration of justice nationwide. In addition, this Court should review the First Circuit's en banc vote-counting procedure in order to eliminate the sharp split among the courts of appeals in their interpretations of Fed. R. App. P. 35(a) and 28 U.S.C. § 46(c), a split that subverts the goal of nationally uniform appellate procedure.

ARGUMENT[1]

1. Respondent's Opposition is perhaps most notable for the arguments it does not make. First, at no point in his Opposition does Respondent question the correctness of the Petition's central thesis, namely, that the scope of the Citizens Protection Act is a question of national importance that should be settled by this Court. The Opposition nowhere challenges the Judges' contention that resolution of the current confusion over which state ethics rules federal prosecutors must follow under the Act is vital to the administration of the federal criminal justice system. Nor does Respondent at any point dispute that the Citizens

[1] References to the Respondent's Opposition are indicated as "Opp." followed by the appropriate page numbers. References to the Appendix to the Judge's Petition for Certiorari and to the Joint Appendix submitted to the First Circuit are indicated as "Pet. App." and "C.A. App." respectively.

Protection Act engendered strong debate in Congress precisely because it marked a change from then-existing Department of Justice policy, a policy that required federal prosecutors to abide by state rules of ethics only insofar as the state rules did not conflict with existing federal law or rules. *See* Richard L. Thornburgh, *Memorandum from Attorney General to All Justice Department Litigators*, June 8, 1989, reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992). The Act was controversial precisely because it was designed to subject government attorneys to *all* state rules governing attorneys, including those rules that might conflict with preexisting federal law.[2] By granting the Petition, this Court can end the confusion over the scope of the Act and fully effect the intent of Congress that federal prosecutors be subject to all state rules governing attorneys.

2. Nor do any of the arguments that Respondent does raise in his Opposition support a denial of certiorari. Respondent contends that the Judges did not present their arguments concerning the scope of the Citizens Protection Act to the courts below. Opp. 19 ("Petitioners' claim is not properly before the Court. . . . The only issue presented to or decided by either court below was [] whether the United States District Court for the District of Massachusetts has the power to promulgate Local Rule 3.8(f) as a local district court rule."). This assertion is flatly contradicted by the

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[2] Despite Respondent's assertions to the contrary, *See* Opp. 13, 21, the Judges do not concede that the First Circuit was correct either in its interpretation of Rule 3.8(f) or in its conclusion that Rule 3.8(f) conflicts with the Federal Rules of Criminal Procedure. The Judges have sought to present only truly certworthy questions in their Petition. They did not raise other, less certworthy, issues — despite their belief that such issues were erroneously decided below — because the issues are not relevant to the grounds on which the Judges seek review in this Court. *See* Sup. Ct. R. 10.

opinions of the courts below. See Pet. App. A7 n.5, A48-A51. That Respondent would make such an assertion is puzzling, especially since Respondent's own brief explicitly mentions the First Circuit's ruling on the question of whether § 530B applies Rule 3.8(f) to federal prosecutors directly, regardless of any conflict with existing federal law. Opp. 11-12. Respondent's citation to a statement by Bar Counsel that he would initiate proceedings under Local Rule 3.8(f) only "pursuant to the applicable Local Rules" is similarly wide of the mark. C.A. App. 98. The record below reveals that Bar Counsel made that statement in an affidavit executed prior to the enactment of the Citizens Protection Act. C.A. App. 100. The affidavit therefore cannot in any way be interpreted as preventing Bar Counsel from initiating appropriate proceedings in federal court pursuant to the Act's mandate.

Respondent reflects at length on the question of whether the First Circuit's decision conflicts with that of the Tenth Circuit in *United States* v. *Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), but fails to rebut the heart of the Petition's argument concerning this conflict. Respondent contends that the decisions of the two circuit courts are not in conflict because a different attorney-subpoena rule was at issue in each case. Opp. 14-16. That difference, however, is irrelevant to the conflict. The conflict, simply put, is this: the First and Tenth Circuits have disagreed over the proper test for evaluating whether a particular state rule falls within the reach of the Citizens Protection Act. Whereas the Tenth Circuit employed a four-factor test to determine whether the Colorado rule applied to government attorneys under the Act, *Colorado Supreme Court*, 189 F.3d at 1287, the First Circuit simply looked to whether the Massachusetts rule created a "novel procedural step."

Pet. App. A51. The difference in the tests necessarily results in the Act having a different scope in the First Circuit than it does in the Tenth Circuit. This Court should grant the writ to resolve this split.

3. In addition, this Court should review the First Circuit's denial of the Judges' request for rehearing en banc. Respondent wholly fails to address the fundamental argument raised in the Judges' Petition, namely, that Fed. R. App. P. 35(a) was adopted by this Court as part of a deliberate effort to ensure the "effective and *uniform* administration of federal appellate justice." *See* 16A Charles Alan Wright et al., *Federal Practice & Procedure* § 3945, at 10 (3d ed. 1999) (emphasis added). The current state of affairs, in which the phrase "in regular active service" is considered by five courts of appeals to include recused judges, and by eight courts of appeals not to include such judges, runs directly counter to this goal of uniformity. *See Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000) ("[T]here is no good reason why a uniform rule [regarding the treatment of recused judges] should not be followed in all the circuits.") (Carnes, J., concerning the denial of rehearing en banc). Review by this Court is necessary to remove "the appearance of rights determined by happenstance" that results from this circuit split. *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 (3d Cir. 1983) (Statement Sur Petition for Rehearing). As Judge Carnes of the Eleventh Circuit recently explained, "[a] litigant who loses before a panel in [one] circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of 'majority of the circuit judges who are in regular active service' should not vary with geography." *Gulf Power Co.*, 226 F.3d at 1225.

Faced with this stark conflict in circuit practice, Respondent suggests only that any "reconsideration of appellate en banc procedure . . . should be undertaken in the context of a proposal to revise the federal rules, not on certiorari review." Opp. 26 n.14. This suggestion is misguided. The present conflict among the circuits has arisen not because of a *lack* of a federal rule governing en banc review, but because of a *difference of interpretation* concerning such a rule. The courts of appeals have split in their interpretation of the meaning of Rule 35(a)'s phrase "in regular active service." Eight circuits have interpreted the phrase not to include recused judges, whereas five circuits, including the First Circuit, have reached the opposite conclusion. *See Gulf Power Co.*, 226 F.3d at 1222. This split requires review by this Court. It does not require, as Respondent suggests, that Rule 35(a) be revised or amended. This is a classic example of a circuit split concerning the meaning of an existing rule; as is usual and appropriate in such situations, what is needed to resolve the split is not revision of the rule but final review by this Court.

Whatever precedential weight the Court's dicta in *Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1, 5 (1963) may have once been entitled to, events subsequent to that decision have rendered that dicta moot. As Respondent himself points out, "'general rules of practice and procedure' promulgated by this Court supersede '[a]ll laws in conflict with such rules.'" Opp. 26 n.14 (quoting 28 U.S.C. § 2072(a) and (b)). Therefore, to the extent that there is any conflict between Rule 35(a) and 28 U.S.C. § 46(c), Rule 35(a) governs. While this Court may have been unwilling to set a uniform standard for procedures governing en banc review at the time it decided *Shenker*, it cannot be said that the Court was similarly unwilling four years later when it promulgated Rule 35(a) as part of

a set of federal rules designed to achieve uniformity of procedure across the federal appellate system. Respondent's argument ignores this history and instead suggests that this Court, as part of an effort to standardize federal appellate procedure, deliberately adopted a rule intended to permit conflicting en banc practices to flourish. By granting review, this Court can restore Rule 35(a) to its intended position: as a nationally uniform rule governing whether a majority of a circuit's judges in regular active service favor en banc review.

4. This Court should grant review not only to promote uniformity of en banc vote-counting procedure, but also because of the pernicious effects wrought by the First Circuit's absolute-majority requirement. Judge Carnes, in an extensive analysis not referenced in Respondent's discussion of *Gulf Power Co.*, explained the many perils of such a requirement. *See Gulf Power Co.*, 226 F.3d at 1222-25.[3] In *Gulf Power Co.* itself, five of the Eleventh Circuit's twelve active judges were recused from participating in the decision of whether to grant en banc review, leaving only seven judges to consider the petition for rehearing. Thus, under the absolute-majority rule employed by the Eleventh Circuit, each of the seven non-recused judges would have had to vote for rehearing en banc in order for it to occur. As Judge Carnes noted, the absolute-majority rule in such a situation permits a single judge to prevent the case from being reheard en banc "no matter how strongly the remaining six non-disqualified judges thought it should be." *Id.* at 1222. Just as one judge was able to thwart the will of six in *Gulf Power Co.*, two judges were able to thwart the will of

[3] While Judge Carnes is mistaken in his view that amendment to Rule 35(a), rather than review of the rule on certiorari, is necessary, his analysis of the absolute-majority requirement's many flaws remains instructive.

three in the case at bar. By granting review, this Court can make clear that the correct interpretation of Rule 35(a) and 28 U.S.C. § 46(c) does not countenance such countermajoritarian results.

CONCLUSION

For the foregoing reasons, and for the reasons set forth previously, the Judges' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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